Filed 3/6/09 Marriage of Groppe and Spring CA2/4

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

In re the MARRIAGE of LAURA GROPPE and MATTHEW SPRING. LAURA GROPPE, Respondent, v. MATTHEW SPRING, Appellant.	B206087 (Los Angeles County Super. Ct. No. BD435859)

APPEAL from an order of the Superior Court of Los Angeles County, Robert A. Schnider, Judge. Affirmed.

D. Joshua Staub for Appellant.

The Law Office of John Derrick and John Derrick for Respondent.

Appellant Matthew Spring and respondent Laura Groppe are currently embroiled in a marriage dissolution proceeding. In 2007, Spring engaged Groppe's former business attorney, D. Joshua Staub, to represent him in the dissolution action. The trial court granted Groppe's motion to disqualify Staub, concluding that there was a substantial relationship between Staub's former representation of Groppe and his current representation of Spring. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Groppe filed the present marriage dissolution action in 2005. On October 10, 2007, Spring gave notice that he had associated Staub as his attorney in the dissolution action. Groppe's attorney objected, advising that Staub had represented Groppe in the creation of her corporation and the trademarking of her company name, and she asked that Staub cease representing Spring. Staub refused to do so.

Groppe filed a motion to disqualify Staub. In support, Groppe submitted her own declaration. It stated that in or about December 2001, Groppe retained Staub to perform legal services for her business, referred to as "Girls Intelligence Agency" or GIA. Over the next two and a half years, Staub "represented GIA in connection with a variety of business-related issues, including but not limited to the incorporation of GIA." Groppe and Staub "spoke very regularly – nearly daily – and in many of our conversations we discussed highly confidential matters. In fact, I often gave him highly confidential information specifically for the purpose of obtaining his legal advice on the subject." Further, they regularly exchanged emails between December 2001 and April 2004. "When I communicated with Mr. Staub over the course of our two-and-a-half year relationship as attorney and client, I always believed that all of our meetings would remain confidential. If I had known that Mr. Staub would be in a position at any time thereafter to share my confidential information with Matt in the event of our divorce, I would never have given him the confidential information I did."

Spring opposed the motion to disqualify. In support, he submitted Staub's declaration, which stated that his representation of GIA "extended to the following matters: [1] Preparing and filing articles of organization and statement of information for Girls Intelligence Agency, LLC ('GIA'); [2] Preparing the operating agreement for GIA; [3] Preparing and filing a fictitious business name statement for GIA; [4] Preparing and filing a [California] trademark application for GIA; [5] Preparing and filing an amendment to the articles of organization for GIA; [6] Preparing and filing a federal trademark application; [7] Obtaining an employer identification number from the IRS; and [8] Advising on one delinquent GIA account. My representation of [Groppe] individually consisted of advising her about [9] a $5,400 tax obligation of a corporation in 2003." Further, "I never visited [Groppe] at her offices nor was I ever invited to do so. I did not speak to [Groppe] on a daily basis about professional matters. I rarely spoke on the telephone with [Groppe], and communicated with her almost exclusively by email. . . . I did not provide estate planning, estate consulting, probate, will drafting, or investment advice to [Groppe] or GIA. I did not assist [Groppe] or GIA in raising any capital or securing any financing. I did not communicate with any investors for [Groppe] or GIA. I did not represent [Groppe] or GIA in any litigation[,] tax, or accounting except to the extent stated . . . . I did not prepare or review financial statements of GIA."

Groppe filed a responsive declaration, which stated that she and Staub continued to communicate about legal matters after 2004, and that she had located additional emails that she and Staub exchanged, including one dated February 2006.

The trial court granted the disqualification motion. Spring timely appealed.

DISCUSSION

I. Appealability and Standard of Review

"An order granting or denying a disqualification motion is an appealable order." (*Machado v. Superior Court* (2007) 148 Cal.App.4th 875, 882; see also *Vivitar Corp. v.*

Broidy (1983) 143 Cal.App.3d 878, 881 ["An order disqualifying counsel from representing a party in litigation is directly appealable"].)

In reviewing an order granting a motion to disqualify, we apply the abuse of discretion standard. (*Ochoa v. Fordel, Inc*. (2007) 146 Cal.App.4th 898, 906; *Koo v. Rubio's Restaurants, Inc*. (2003) 109 Cal.App.4th 719, 728.) "'If the trial court resolved disputed factual issues, the reviewing court should not substitute its judgment for the trial court's express or implied findings supported by substantial evidence. [Citations.] When substantial evidence supports the trial court's factual findings, the appellate court reviews the conclusions based on those findings for abuse of discretion. [Citation.] However, the trial court's discretion is limited by the applicable legal principles. [Citation.] Thus, where there are no material disputed factual issues, the appellate court reviews the trial court's determination as a question of law. [Citation.]'" (*Ochoa v. Fordel, Inc*., *supra*, 146 Cal.App.4th at p. 906.)

II. The "Substantial Relationship" Test

The authority of a trial court to disqualify an attorney derives from its inherent power """ [t]o control in furtherance of justice, the conduct of its ministerial officers."""" (*City and County of San Francisco v. Cobra Solutions, Inc.* (2006) 38 Cal.4th 839, 846 (*Cobra Solutions*); *People ex rel. Dept. of Corporations v. SpeeDee Oil Change Systems, Inc*. (1999) 20 Cal.4th 1135, 1146 (*SpeeDee*); Code Civ. Proc., § 128, subd. (a)(5).) "'Ultimately, disqualification motions involve a conflict between the clients' right to counsel of their choice and the need to maintain ethical standards of professional responsibility.' (*SpeeDee*, at p. 1145.) As we have explained, however, '[t]he paramount concern must be to preserve public trust in the scrupulous administration of justice and the integrity of the bar.' (*Ibid*.)" (*Cobra Solutions*, at p. 846.)

"Protecting the confidentiality of communications between attorney and client is fundamental to our legal system. The attorney-client privilege is a hallmark of our jurisprudence that furthers the public policy of ensuring '"the right of every person to freely and fully confer and confide in one having knowledge of the law, and skilled in its

practice, in order that the former may have adequate advice and a proper defense." [Citation.]' (*Mitchell v. Superior Court* (1984) 37 Cal.3d 591, 599.) To this end, a basic obligation of every attorney is '[t]o maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client.' (Bus. & Prof. Code, § 6068, subd. (e).)" (*SpeeDee, supra,* 20 Cal.4th at p. 1146.)

The enduring duty to preserve client confidences precludes an attorney from later agreeing to represent an adversary of the attorney's former client unless the former client provides an "informed written consent" waiving the conflict. (Rules Prof. Conduct, rule 3-310(E).) If the attorney fails to obtain such consent and undertakes to represent the adversary, the former client may disqualify the attorney by showing a "substantial relationship" between the subjects of the prior and the current representations. (*Cobra Solutions, supra*, 38 Cal.4th at p. 847.) "To determine whether there is a substantial relationship between successive representations, a court must first determine whether the attorney had a direct professional relationship with the former client in which the attorney personally provided legal advice and services on a legal issue that is closely related to the legal issue in the present representation. (*Jessen v. Hartford Casualty Ins. Co.* (2003) 111 Cal.App.4th 698, 710-711.) If the former representation involved such a direct relationship with the client, the former client need not prove that the attorney possesses actual confidential information. (*Id.* at p. 709.) Instead, the attorney is presumed to possess confidential information if the subject of the prior representation put the attorney in a position in which confidences material to the current representation would normally have been imparted to counsel." (*Cobra Solutions, supra*, 38 Cal.4th at p. 847.) "When a substantial relationship between the two representations is established, the attorney is automatically disqualified from representing the second client." (*Ibid.*)

This standard, with its conclusive presumption of knowledge of confidential information, is "justified as a rule of necessity" because "'"it is not within the power of the former client to prove what is in the mind of the attorney. Nor should the attorney have to 'engage in a subtle evaluation of the extent to which he acquired relevant information in the first representation and of the actual use of that knowledge and

information in the subsequent representation.'" [Citations.] The conclusive presumption also avoids the ironic result of disclosing the former client's confidences and secrets through an inquiry into the actual state of the lawyer's knowledge and it makes clear the legal profession's intent to preserve the public's trust over its own self-interest. [Citations.]' [Citation.]" (*Jessen v. Hartford Casualty Ins. Co.*, *supra*, 111 Cal.App.4th at p. 706.)

The court applied these disqualification principles in *Knight v. Ferguson* (2007) 149 Cal.App.4th 1207 (*Knight*). There, the plaintiff planned to open a restaurant and found a partner to assist with the financing. Prior to formalizing the partnership, she met with Attorney Wideman, who also represented her sister and brother-in-law (the Fergusons), to discuss the partnership agreement and the restaurant lease. When the intended partnership did not materialize, the plaintiff asked the Fergusons to take her partner's place. They agreed. (*Id*. at p. 1211.) The following year, however, the relationship soured and the plaintiff sued the Fergusons for breach of contract and sought dissolution of the partnership. The Fergusons cross-claimed and retained Wideman to represent them. (*Ibid*.)

Plaintiff moved to disqualify Wideman. In her declaration, she said she told Wideman of her "'feelings [about] litigation and [her] position . . . relating to the [restaurant] lease. . . .' She also discussed her relationship with [her intended partner] and her plans to 'purchase' the [restaurant] 'ground lease.'" (*Knight*, *supra*, 149 Cal.App.4th at p. 1211.) Wideman submitted an opposing declaration in which he stated that he did not obtain confidential information from the plaintiff. He said that he met with plaintiff at the request of the Fergusons, who were also present, and that plaintiff discussed with him potential litigation involving her former partner. (*Id*. at p. 1212.)

The trial court granted the motion to disqualify, concluding that the nature of Wideman's representation was such that confidential information material to the dispute between the plaintiff and the Fergusons normally would have been imparted to him. (*Knight*, *supra*, 149 Cal.App.4th at p. 1212.) The Court of Appeal affirmed. It rejected the Fergusons' contention that there was not a substantial relationship between

Wideman's prior representation of plaintiff and the current litigation, noting that both concerned the same business venture. It explained: "The legal theories and issues that an attorney discusses with a former client may be different than those involved in the subsequent lawsuit against that client. But the substantial relationship test is broad and not limited to the 'strict facts, claims, and issues involved in a particular action.' (*Jessen, supra,* 111 Cal.App.4th at p. 711.) '[A] "substantial relationship" exists whenever the "subjects" of the prior and the current representations are linked in some rational manner. [Citation.]' (*Ibid.*)" (*Knight,* at p. 1213.) In the present case, plaintiff retained Wideman to discuss a lease and partnership relating to the creation of the restaurant "which is the subject of this action." (*Ibid.*) Further, plaintiff's consultations with Wideman occurred "at a critical stage, when [plaintiff] was creating the business entity which is at the heart of this action." (*Id.* at pp. 1213-1214.) Accordingly, plaintiff's discussions with her former partner "are . . . linked to issues in this action." (*Id.* at pp. 1213-1214.)

The court concluded: "A 'distinct fundamental value of our legal system is the attorney's obligation of loyalty.' [Citation.] The disqualification rule is 'to keep honest attorneys from having to choose between conflicting duties, or being tempted to reconcile conflicting interests, rather than fully pursuing their clients' rights. [Citation.] The loyalty the attorney owes one client cannot be allowed to compromise the duty owed another. [Citation.]' [Citation.] The trial court's ruling ends this ethical dilemma and protects [plaintiff's] interests as a former client." (*Knight, supra,* 149 Cal.App.4th at p. 1216.)

The court reached a similar result in *Brand v. 20th Century Ins. Co./21st Century Ins. Co.* (2004) 124 Cal.App.4th 594 (*Brand*). There, Attorney Zalma represented 21st Century Insurance Company (the insurer) for three years, providing coverage opinions and defending the insurer in a variety of coverage disputes. (*Id.* at p. 599.) Twelve years later, an insured filed suit against the insurer for breach of contract and bad faith arising out of her claim for water damage to her home. She designated Zalma as her expert to testify on the issue of the insurer's handling of her claims. (*Id.* at p. 600.)

The trial court denied the insurer's motion to disqualify, indicating that a substantial relationship could not be established based on the amount of time between the two engagements. (*Brand*, *supra*, 124 Cal.App.4th at p. 601.) The Court of Appeal reversed. (*Id*. at p. 605.) The court noted that in his prior representation of the insurer Zalma had rendered coverage opinions on a variety of claims, including for moisture intrusion, and had defended the insurer in actions by policyholders seeking coverage and/or alleging bad faith. (*Id*. at p. 606.) Therefore, "from both a factual and legal perspective, the two engagements must be deemed substantially related, presenting a substantial risk "'that representation of the present client will involve the use of information acquired in the course of representing the former client . . . .'" [Citation.] Since, in these circumstances, 'confidences *could have* been exchanged between the lawyer and the client, courts will conclusively presume they *were* exchanged, and disqualification will be required.' [Citation.]" (*Id*. at pp. 606-607.)

Further, the court said that neither Zalma's professed failure to recall any confidential information obtained during his representation of the insurer nor the passage of 12 years could overcome the conclusive presumption in this case. "'Where the factual presentations of the parties stray into the prohibited world covered by the conclusive presumption, the dispute effectively becomes a "subtle evaluation of the extent to which [the attorney] acquired relevant information in the first representation and of the actual use of that knowledge and information in the subsequent representation." [Citation.] When this occurs, the base purpose of the conclusive presumption is subverted by what in reality is an "inquiry into the actual state of the lawyer's knowledge" and, as a result, the client's confidences are in danger of disclosure, however inadvertent.' [Citations.]" (*Brand*, *supra*, 124 Cal.App.4th at p. 607.)

III. The Trial Court Did Not Abuse Its Discretion by Granting the Motion to Disqualify Staub

As in *Knight* and *Brand*, the undisputed evidence before the court in this case establishes the requisite substantial relationship between Staub's former engagement as

Groppe's and GIA's business lawyer and his current engagement as Spring's divorce lawyer. It is undisputed that Staub represented Groppe between 2001 and 2004 in matters relating to her business, including preparing and filing GIA's articles of incorporation, preparing GIA's operating statement, preparing and filing trademark applications for GIA, advising on a delinquent GIA account, and advising Groppe about a tax liability. It also is undisputed that the issues still before the trial court in the dissolution action include the division of Groppe's and Spring's property, including the valuation and disposition of GIA. Accordingly, as in *Knight*, Staub's prior representation of Groppe embraced legal issues related to the formation and maintenance of a business "which is the subject of" the present action. (*Knight, supra*, 149 Cal.App.4th at p. 1213.) Further, Groppe's consultations with Staub "occurred at a critical stage," when Groppe "was creating the business entity which is at the heart of this action." (*Ibid.*)[1] Under these circumstances, we must conclude that a substantial relationship exists because "'the "subjects" of the prior and the current representations are linked in some rational manner.'" (*Ibid.*)

Spring contends that the disqualification motion should have been denied because it "does not show that [Staub] actually acquired confidential information adverse to [Groppe]." We do not agree. As the court explained in *Knight*, "The 'aggrieved client' need only satisfy a 'low threshold of proof' and does not have to prove the attorney actually received confidential information. [Citation.] Where a substantial relationship is shown between the prior representation and the present case, (1) it is presumed the

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[1] Indeed, Staub's representation of Groppe continued for far longer, and involved significantly more contacts between attorney and client, than was the case in *Knight*. Unlike in *Knight*, where plaintiff testified to only three meetings with counsel, in the present case Groppe stated in her declaration that she and Staub "spoke very regularly – nearly daily" over a two-and-a-half-year period.

We note that Staub controverted Groppe's testimony, asserting that he and Groppe rarely spoke. On appeal, however, we "do not weigh the evidence or resolve evidentiary conflicts." (*Knight, supra*, 149 Cal.App.4th at p. 1214.) Instead, we are required by the applicable standard of review to presume that the trial court resolved any credibility disputes in favor of Groppe. (*Ibid.*)

attorney received confidential information [citation], and (2) the attorney's disqualification 'is mandatory.'" (149 Cal.App.4th at p. 1214.) The court made a similar observation in *Brand*, emphasizing that counsel's "professed failure to recall any confidential information obtained during his representation of [insurer] . . . can[not] overcome the conclusive presumption." (*Brand, supra,* 124 Cal.App.4th at p. 607.) Accordingly, Groppe's alleged failure to prove that Staub actually acquired confidential information adverse to her is immaterial to the resolution of the disqualification motion.

Spring also contends that Groppe's business and financial information is not confidential in the context of the present dissolution action because Groppe has a fiduciary duty to furnish Spring with information regarding community property. Again, we do not agree. The court addressed a similar contention in *Farris v. Fireman's Fund Ins. Co.* (2004) 119 Cal.App.4th 671, 685, where respondents contended that an attorney's prior representation of a party did not require disqualification because "'much of the information provided to a coverage attorney by the insurer will inevitably be the subject of discovery in a bad faith action.'" The court rejected the contention, explaining as follows: "Respondents may be entitled to 'much of the information' Wilkins had access to as coverage counsel, but respondents are not entitled to have, through discovery or through the mind and experience of Wilkins, the confidential information Wilkins is presumed to have acquired during his prior representation of [the insurer]." (*Ibid*.)

Spring contends finally that Groppe's declaration is too conclusory to support Staub's disqualification. We are not persuaded. Spring has not pointed us to a single attorney disqualification case that supports his contention that Groppe's declaration contains insufficient detail. Further, attorney disqualification opinions authored by other courts suggest that Groppe's declaration was sufficient. (E.g., *Knight, supra*, 149 Cal.App.4th at p. 1211 [declaration stated that plaintiff told attorney "of her 'feelings [about] litigation and [her] position . . . relating to the [restaurant] lease,'" as well as her relationship with her former partner and her plans to "'purchase' the [restaurant] 'ground lease'"].)

For all of these reasons, we conclude that the trial court did not abuse its discretion by granting the motion to disqualify counsel.

DISPOSITION

The order granting the motion to disqualify counsel is affirmed. Respondent shall recover her costs on appeal.

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SUZUKAWA, J.

We concur:

EPSTEIN, P. J.

WILLHITE, J.